

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34868

KELLY GENE BURKE,	)	2009 Unpublished Opinion No. 394
	)	
Petitioner-Appellant,	)	Filed: March 23, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO DEPARTMENT OF	)	THIS IS AN UNPUBLISHED
TRANSPORTATION,	)	OPINION AND SHALL NOT
	)	BE CITED AS AUTHORITY
Respondent.	)	
	)	

---

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. John H. Bradbury, District Judge.

Order affirming administrative suspension of driver's license, affirmed.

Clark and Feeney; Johathan D. Hally, Lewiston, for appellant. Jonathan D. Hally argued.

Hon. Lawrence G. Wasden, Attorney General; Edwin L. Litteneker, Special Deputy Attorney General, Boise, for respondent. Edwin L. Litteneker argued.

---

GUTIERREZ, Judge

Kelly Gene Burke appeals from the district court's order affirming the administrative suspension of his driver's license. For the reasons set forth below, we affirm.

I.

BACKGROUND

Burke was arrested for driving under the influence of alcohol, I.C. § 18-8004, after a breath test using the Intoxilyzer 5000 revealed that his blood alcohol concentration (BAC) was .205 / .200. His driver's license was immediately suspended by the arresting officer, and Burke requested an administrative hearing pursuant to I.C. § 18-8002A. The Idaho Department of Transportation (DOT) hearing officer assigned to the case conducted a telephonic hearing at

which Burke and the arresting officer both testified.<sup>1</sup> The hearing officer entered written findings of fact and conclusions of law and ordered the ninety-day driver's license suspension into effect. The district court affirmed the suspension upon appeal. Burke now appeals to this Court, asserting that the hearing officer's determination that the breath test was administered in accordance with I.C. § 18-8004(4) was unsupported by the record and was arbitrary and capricious.

## II. STANDARD OF REVIEW

The Idaho Administrative Procedures Act (IDAPA) governs the review of Department of Transportation decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. In an appeal from the decision of the district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669.

The Court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price*

---

<sup>1</sup> Both the arresting officer's and Burke's testimony related to how thoroughly the officer checked Burke's mouth for foreign substances, an issue contested below but not raised on appeal.

*v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. If the agency's decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary." I.C. § 67-5279(3).

### III.

#### DISCUSSION

The administrative license suspension statute, I.C. § 18-8002A, requires that the DOT suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. *State Dep't of Transp. v. Gibbar*, 143 Idaho 937, 942, 155 P.3d 1176, 1181 (Ct. App. 2006). The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has been notified of such an administrative license suspension may request a hearing before a hearing officer designated by the DOT to contest the suspension. I.C. § 18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18-8002A(7); *Gibbar*, 143 Idaho at 942, 155 P.3d at 1181; *Kane v. State Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003). The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); *Gibbar*, 143 Idaho at 942, 155 P.3d at 1181; *Kane*, 139 Idaho at 589, 83 P.3d at 133.

Burke contends that the DOT hearing officer should have vacated his driver's license suspension because the breath test was "not conducted in accordance with the requirements of section 18-8004(4), Idaho Code." I.C. § 18-8002A(7)(d). Burke further contends that the hearing officer's determination to suspend his license was "not supported by substantial evidence on the record as a whole" and was "arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3)(d), (e). Idaho Code Section 18-8004(4) provides that tests to determine alcohol concentration of blood, urine, or breath must be performed in facilities or by methods approved by the Idaho State Police and in compliance with standards set by the State Police. *Mahurin v. State Dep't of Transp.*, 140 Idaho 656, 658, 99 P.3d 125, 127 (Ct. App. 2004) To carry out the authority conferred by that statute, the State Police issued operating manuals establishing procedures for the maintenance and operation of breath test equipment, including the Intoxilyzer 5000. See IDAHO ADMIN. CODE 11.03.01.013.03, 11.03.01.013.05. Noncompliance with these procedures is one of the grounds for vacating an administrative license suspension under I.C. § 18-8002A(7)(d). *Mahurin*, 140 Idaho at 658-59, 99 P.3d at 127-28.

In order to properly maintain an Intoxilyzer 5000, a calibration check must be run each time the equipment is used on a suspect driver. IDAHO STATE POLICE, STANDARD OPERATING PROCEDURE: BREATH ALCOHOL TESTING (SOP) 2.2.2 (2006).<sup>2</sup> The 0.08 solution used to perform the calibration check is to be changed "approximately every 100 calibration checks or every month whichever comes first." SOP 2.2.1.1.2.1. When the 0.08 solution is changed, "a four-sample (two print cards) simulator port calibration check using a 0.20 solution must be run." SOP 2.2.1.1.2.2. Furthermore, calibration check information "should be entered in the instrument log." SOP 2.2.3.1. The instrument log for the Intoxilyzer 5000 used on Burke prior to his arrest shows that the 0.08 solution was changed on January 28, 2007, thirteen days before his arrest on February 10. The officer<sup>3</sup> who changed the 0.08 solution recorded the results of a single calibration check using 0.20 solution. The test was within an acceptable range, registering at 0.207. The breath test administered to Burke included the seventh calibration check after the 0.08 solution was changed

---

<sup>2</sup> Parts of the SOP have been renumbered and revised since Burke's arrest. The relevant portions are now located at 2.3. None of the revisions would alter the outcome in this case.

<sup>3</sup> The officer who changed the 0.08 solution is not the same officer who arrested Burke.

Based on this information, Burke asserts that only one calibration check was run at the 0.20 level, and therefore the Intoxilyzer was not properly calibrated in accordance with the standard operating procedures, rendering the test results invalid. The hearing officer concluded that although the instrument operation log showed only one calibration check at the 0.20 level was recorded in the log, this did not mean that the four sample calibration check was not performed. According to the Standard Operating Procedures, calibration check information *should* be recorded in the log; this is a discretionary procedure, not a mandatory one.

Burke bore the burden of proving by a preponderance of the evidence that his breath test was not administered in accordance with I.C. § 18-8004(4) because the four mandatory calibration checks required by SOP 2.2.1.1.2.2 were not run. A preponderance of the evidence means that the evidence shows something to be more probably true than not. *Oxley v. Medicine Rock Specialties*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003); *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 9 n.2, 415 P.2d 48, 51 n.2 (1966). Therefore, Burke had to show that it was more probably true than not that only one calibration check was run when the 0.08 solution was changed. The hearing officer concluded that this was not the case. Burke could have called the calibration officer to testify at the hearing in order to clarify the procedures followed, but chose not to. The fact that only one result was recorded does not make it more probably true than not that the officer conducted only the single calibration check. The results of Burke's actual Intoxilyzer test further support this conclusion. Prior to measuring Burke's blood alcohol concentration, the Intoxilyzer 5000 ran a self-calibration check, which was in standard range, showing that the machine was functioning properly at the time of Burke's test.<sup>4</sup>

Simply creating an inference of impropriety in the calibration check procedures is insufficient to prove by a preponderance of the evidence that the impropriety actually occurred. Nor does it relieve Burke of the burden of proof and shift the burden to the DOT to prove that

---

<sup>4</sup> Burke was required to show not only that the Standard Operating Procedures were not followed, but also that the Intoxilyzer 5000 was not functioning properly at the time of his test. *Archer v. State Dep't of Transp.*, 145 Idaho 617, 621, 181 P.3d 543, 547 (Ct. App. 2008) ("Archer bore the burden of proof at the ALS hearing and, because he produced no evidence regarding the lack of a calibration check or the reliability of the Alco-Sensor III, he failed to meet his burden of proof."); *see also* I.C. § 18-8004(4) (providing that "the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control . . . shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination").

proper procedures were followed. *See Mahurin*, 140 Idaho at 660, 99 P.3d at 129 (reaffirming that where the evidentiary record is insufficient to establish whether proper procedures were followed, it is the driver who has failed to meet the burden of proof, not the DOT). Although conflicting inferences could be drawn, when reasonable minds could differ, we affirm the decision of the board so long as there is substantial evidence to support that decision. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 137, 176 P.3d 126, 142 (2007). There is substantial evidence in the record from which to conclude that Burke failed to show by a preponderance of the evidence that his breath test was administered in violation of I.C. § 18-8004(4). Therefore, the hearing officer did not enter an order unsupported by substantial evidence or that was arbitrary or capricious.

#### **IV.**

#### **CONCLUSION**

The hearing officer's conclusion that Burke failed to meet his burden of proof was supported by substantial evidence in the record. Although the officer who changed the 0.08 solution recorded the results of only one 0.20 solution calibration check, Burke failed to show by a preponderance of the evidence that only one calibration check was actually performed. Therefore, Burke's breath test was conducted in accordance with Idaho Code and Idaho State Police standard operating procedures. The district court's order affirming the administrative suspension of Burke's driver's license is affirmed.

Judge PERRY and Judge GRATTON **CONCUR.**